

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

_____)	
Computer Reservations System (CRS))	Dockets
Regulations (14 C.F.R. Part 255) –)	OST-97-2881
Advance Notice of Proposed)	OST-97-3014
Rulemaking)	OST-98-4775
_____)	

**SUPPLEMENTAL REPLY COMMENTS
OF DELTA AIR LINES, INC.**

Communications with respect to this document should be addressed to:

D. Scott Yohe
Senior Vice President -
Government Affairs
DELTA AIR LINES, INC.
1275 K Street, N.W.
Washington, D.C. 20005
(202) 216-0700

John J. Varley
Assistant General Counsel
Robert J. LaPorta
Attorney
DELTA AIR LINES, INC.
Law Department #981
1030 Delta Boulevard
Atlanta, Georgia 30320
(404) 715-2872

October 23, 2000

Robert E. Cohn
Alexander Van der Bellen
SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8060

Attorneys for
DELTA AIR LINES, INC.

TABLE OF CONTENTS

	Page
I. INTRODUCTION.	1
A. There has been No Showing that Regulation of the Internet is Necessary to Protect Competition or Consumers.	1
B. The CRS Rules Should Be Continued, But Only if Applied to CRSs Marketed by Carriers and to Carriers that Market a CRS.	3
II. THE DEPARTMENT SHOULD NOT REGULATE AIRLINE DISTRIBUTION ON THE INTERNET.	5
A. Limitations on the Department’s Jurisdiction Preclude Prospective Regulation of the Internet.	9
B. The Department Does Not Need Special Regulations for Multi- Carrier Sites.	11
C. The Department Can Rely on Carriers to Police Display Bias.	12
D. If the Department Adopts New Disclosure Requirements for Online Travel Agencies, All Travel Agencies Should be Covered by the Same Rules.	16
E. There is No Basis to Single Out Carrier-Owned Internet Sites for Special Regulatory Treatment.	18
III. THE CURRENT CRS RULES NEED TO BE REFORMED.	19
A. Emancipate Travel Agents from Restrictive CRS Contract Terms.	19
B. Eliminate Illegal Tying of Internet Products by CRS Vendors.	22
C. Eliminate The Forced Participation Rule.	23
IV. THE DEPARMENT SHOULD RETAIN THE CRS RULES, BUT ONLY IF THEY ARE APPLIED TO SYSTEMS MARKETING BY CARRIERS.	24
A. The Department Should Continue to Regulate Systems and Not Ticket Agents.	27
V. CRS BOOKING DATA.	28

VI. CONCLUSION.....	28
----------------------------	-----------

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.
October 23, 2000**

)	
Computer Reservations System (CRS))	Dockets
Regulations (14 C.F.R. Part 255) –)	OST-97-2881
Advance Notice of Proposed)	OST-97-3014
Rulemaking)	OST-98-4775
)	

**SUPPLEMENTAL REPLY COMMENTS
OF DELTA AIR LINES, INC.**

I. INTRODUCTION.

The Department's supplemental notice of proposed rulemaking asked commenters to address two key issues: First, should the Department take steps to regulate airline distribution practices on the Internet? Second, is there a continued need and adequate jurisdictional basis to regulate CRSs in light of declining direct investment by carriers?

A. There has been No Showing that Regulation of the Internet is Necessary to Protect Competition or Consumers.

There is no regulation of airline distribution channels on the Internet today. However, out of this "anarchy" a number of remarkable developments have taken place:

- Consumers now have immediate access to a tremendous wealth of information, exceeding that which is available to professional travel agents through traditional CRSs.

**Supplemental Reply Comments
of Delta Air Lines, Inc.
Page 2**

- There is vigorous competition for online ticket sales, with multiple sites competing to offer the most complete, convenient, and easy to use displays of travel information.
- Consumers have been able to enjoy unprecedented low last-minute discount sales of left-over carrier inventory, which the airlines were previously unable to offer profitably through traditional high-cost distribution channels.
- New discount products such as priceline.com have emerged, offering discretionary travelers new cost-saving alternatives (even for last minute travel) which did not previously exist.
- Consumers have embraced Internet technology as an alternative information source for their travel needs.
- The online travel marketplace has been characterized by a general absence of consumer complaints.

In contrast to these actual observations -- which are undeniably procompetitive and proconsumer -- the proponents of Internet regulation base their arguments on speculation and conjecture about what *might* happen in the absence of regulation. The Department should have faith in the marketplace, and intervene only when and if specific and identifiable competitive harms require targeted remedial action.

There is vigorous competition in online travel services today. Moreover, the open and unrestricted architecture of the Internet – which affords consumers immediate access to any online travel retailer -- makes it extremely implausible that any competitor or group of competitors could control or monopolize the Internet. In these circumstances, the potential for harming the development of this rapidly evolving electronic marketplace through unnecessary regulation far outweighs any conceivable benefits of regulation.

B. The CRS Rules Should Be Continued, But Only if Applied to CRSs Marketed by Carriers and to Carriers that Market a CRS.

The Department adopted the CRS rules in 1984 in order to protect competition and consumers. At that time, convenient and reliable access to carrier schedules, fares and current inventory was provided by a handful of CRSs that were all owned and controlled by airlines. Without the rules, it was found that carriers could use their ownership interests in CRSs to influence airline competition, by suppressing information about competing carrier services.

There is arguably less need for the rules today, because the Internet has given consumers the ability to check alternative travel options from multiple competing sites on the web. Because of this, the potential for CRSs to filter out information about competitive services has been significantly reduced. If travel agents fail to find flights that are best suited to their clients' needs due to bias or other

**Supplemental Reply Comments
of Delta Air Lines, Inc.
Page 4**

shortcomings of a particular CRS, such agents are increasingly likely to have to answer to clients who are using the Internet to pre-screen flight options and to check up on their travel agents. These new marketplace realities provide CRSs with appropriate incentives to provide complete and unbiased information, which did not exist at the time the rules were originally adopted in 1984.

In addition, carriers have been selling down their interests in CRSs. There are no longer any CRSs in the United States that are effectively controlled by a single carrier. Sabre, the largest CRS, has no direct carrier owners. Thus, no single carrier has the ability, by virtue of its ownership interest, to force any CRS to adopt policies, such as display bias, to benefit that carrier in the marketplace.

While some carrier-CRS relationships (such as the Sabre/American/Southwest marketing alliance) may not meet the 5 percent ownership test which the Department has traditionally used as the threshold for exercising jurisdiction, such CRS/carrier marketing alliances involve interested financial relationships that are every bit as significant as a 5 percent minority ownership interest.

On balance, Delta, like most commenters, favors continuing the CRS rules in effect, at least for the next three to five years. Although the Internet has reduced (and will continue to reduce) the control that CRSs have historically had over the flow of travel information, CRSs are still the primary source that travel agents use to procure information for their clients. And, due to productivity pricing and other

restrictive contract terms, CRSs have been largely successful in restricting travel agents to using a single CRS system. Thus, the potential for harm to competition and consumers is present, should bias be introduced that favors a carrier affiliated with a particular CRS.

However, if the Department is going to continue the rules, it is vitally important that the Department update the rules to apply equally to systems that are marketed, as well as owned, by carriers. If the Department declines to take this essential step to ensure equal treatment of CRSs and carriers that own or market a CRS, then the Department should simply abandon the rules altogether. While Delta believes the intention of the CRS rules is beneficial, no regulation is preferable to an uneven playing field created by the DOT, where only some carriers and CRSs are regulated.

II. THE DEPARTMENT SHOULD NOT REGULATE AIRLINE DISTRIBUTION ON THE INTERNET.

No commenters have disputed that the Internet revolution has produced dramatic benefits for consumers and airline competitors alike. Consumers have more complete and up-to-date information from more competitive sources than ever before. Airlines have been able to take advantage of Internet technology to lower distribution costs and to offer innovative discount products that were not economical using traditional high-cost distribution networks.

**Supplemental Reply Comments
of Delta Air Lines, Inc.
Page 6**

There has been no showing that consumers are having difficulty finding accurate and complete information to assist their purchasing decisions on the web. Consumers are highly discriminating and have the ability to pick and chose from a multitude of online stores with the click of a mouse. Depending on their particular needs, some consumers may visit individual carrier websites, others may choose online superstores like Travelocity and Expedia, bargain hunters may want to try bidding for travel on sites like priceline.com, sites specializing in package tours fit another set of consumer needs, and consumers used to dealing with travel agencies may visit the online sites developed by traditional travel agencies themselves.

The debate about extending CRS type regulation to the Internet centers not around what *has* happened, but rather around what *might* happen. Given the abundance of healthy competition for airline ticket sales on the Internet, and the absence of any demonstrated harm to consumers, it would be a grievous policy error for the Department to extend CRS-type regulation to the Internet. Moreover, the propagation of ill-conceived and wide-ranging regulation of the Internet would be fundamentally inconsistent with the Administration's Policy Framework for global economic commerce, which advocates a "hands off" regulatory approach, with only minimal government intervention when strictly necessary. See Delta Supplemental Comments at 23-25. Activist regulation of the Internet would also not comport with

**Supplemental Reply Comments
of Delta Air Lines, Inc.
Page 7**

Congress' mandate to the Department to place "maximum reliance on competitive market forces" 49 U.S.C. § 40101(a)(6).

As Delta and other commenters have pointed out, the Department needs to be extremely mindful of the law of unintended consequences. The potential for harm to the e-commerce medium far outweighs any benefits of regulation at this stage.

Delta's Comments and Supplemental Comments have detailed at length the fundamental differences that exist between closed CRS systems -- that lock travel agents into a single data source and make it possible for CRSs to exert undue influence over the flow of travel information -- and, the Internet which is characterized by a completely open and unrestricted architecture, that makes it virtually impossible for Internet vendors to limit the flow of competitive information about airline services.

The Department needs to focus on making the traditional CRS-Travel Agency relationship look more like the Internet by increasing travel agent mobility and range of choice -- NOT making the Internet look more like the CRS industry by extending a set of superfluous regulations to online travel sites. Under the present rules, CRSs have been able to continue to exercise market power, and have not been effectively cost-disciplined by the marketplace. The Internet, however, holds the promise for intensifying competition for distribution services and lowering costs for airlines and consumers. Therefore, it is not surprising that the CRSs themselves are among the

**Supplemental Reply Comments
of Delta Air Lines, Inc.
Page 8**

strongest advocates of extending CRS-based rules to the Internet. The CRSs would like the Department's assistance in leveraging their dominant positions in distribution services to regulatory protected franchises on the web.

The major proponents of Internet regulation are (1) the CRSs who are intent on extending the dominance of their system-based products to the Internet, (2) major online travel sites such as Travelocity and Expedia, which are closely tied to (and the in case of Travelocity directly owned by) the established CRSs, and (3) traditional travel agencies that have become dependent on CRSs, and which are resisting adaptation to a marketplace where consumers have equal or greater access to information on the web.

The Department should not take as a good sign that the CRS establishment culture is among the strongest proponents of Internet regulation. The CRSs would like nothing better than for the Department to require new online competitors to conform to a set of rules developed over 15 years ago to remedy competitive harms particular to the fundamentally different CRS industry.

Thus, while it is currently relatively easy for potential Internet start-up companies to develop useful but limited websites to sell airline products, only the established CRSs have developed the complex linkages necessary to access and sell inventory from large numbers of participating carriers. If the Department adopted rules requiring Internet sites to comply with CRS-type rules, the Department will be

erecting barriers to entry, limiting the data resources available to Internet start-ups, and ensuring that those new companies will need to rely on costly CRSs as their booking engines.

The best way for the Department to ensure the continued growth of healthy Internet competition is to retain a hands-off regulatory approach and engage in limited remedial action *only* when and if particular instances of competitive harm are identified.

The Department should resist the unsupported doomsday predictions that, without regulation, the Internet will become an evil tool for the airlines mislead hapless consumers into paying higher fares or purchasing services that do not match their needs. There is no evidence that this has happened, and there is no likelihood that it would ever happen. The marketplace is a more efficient regulator than the government, and consumers are savvy enough to recognize which sites deliver accurate and reliable information, and which do not.

A. Limitations on the Department's Jurisdiction Preclude Prospective Regulation of the Internet.

Apart from the important policy considerations that mitigate against regulating in this area, the Department's jurisdiction to regulate the development of Internet sites is highly problematic. The "essential facilities" rationale the Department used to regulate traditional CRSs does not apply to Internet sites. While

**Supplemental Reply Comments
of Delta Air Lines, Inc.
Page 10**

the Internet is an important and growing distribution medium, online bookings currently constitute only a small fraction of total airline sales.

In contrast to CRSs, where most airlines have no alternative but to participate if they want to have a presence in travel agencies using that system, because of complete consumer mobility on the web no one site could remotely be considered “essential” to the distribution of an airline’s product. This will continue to be true, even as the total volume of Internet sales increases. Carriers do not need to participate in every site on the web in order to enjoy the benefits of Internet marketing. Furthermore, carriers have shown a willingness to discontinue participation when they are dissatisfied with the services provided by a particular Internet vendor. This is hardly indicative of an “essential facility.”

Finally, the jurisdiction conferred by section 41712 limits the Secretary to taking remedial action when an air carrier or ticket agent “*has been or is engaged in* an unfair or deceptive practice or method of competition . . .” (emphasis added). There has been no showing that the operation of any Internet site “is” or “has been” an unfair or deceptive practice. The imposition of prophylactic regulation at this point would exceed the Department’s authority to engage in remedial regulation in response to a particular identified harm.

While the abuses of CRSs were well established prior to the Department’s adoption of the rules in 1984, those same findings cannot simply be extended on a

wholesale basis to consumer Internet sites because of the fundamentally different nature of the distribution systems. To do so would be arbitrary and capricious, constitute an abuse of discretion, and would exceed the Department's limited jurisdictional authority.

B. The Department Does Not Need Special Regulations for Multi-Carrier Sites.

Some commenters have called for regulations to require any sites that provide information on multiple carriers to label themselves as "biased" if they do not provide neutral display treatment or do not include all airlines. Again, the marketplace, rather than regulation, should govern the display content and inventory of Internet travel sites. There is vigorous competition among sites to provide complete and accurate information in order to attract consumers. Sites that fail to give such information will find themselves disadvantaged in the marketplace. Conversely, sites that stock or display services only of certain airlines may be well suited to the needs of some customers, and are not necessarily harmful to competition or consumers.

By way of analogy, an athletic shoe store might stock Nike, New Balance and Adidas, but not Reebok. An Internet seller of computer equipment might have information about Dell, Compaq and Toshiba, but not IBM. Should the FTC require such retailers to display a sign in its storefront window or on its homepage

disclosing this “bias”? Of course not. Likewise, the Department should not seek to regulate the content of Internet travel sites. Consumers are free to comparison shop between competing Internet sites – and they can do so even more quickly and easily than visiting several shoe stores at a mall. The Department should have faith that customers will be able see for themselves what services are for sale, and if the prices are competitive, at any given travel portal.

There is an important marketplace advantage for Internet travel sites to offer consumers a large and conveniently arranged selection of carrier services. Thus, competitive forces will drive Internet portals to include as many carriers as possible and not to unduly bias displays. If a site purports to offer complete and unbiased information, but does not, then the Department or the FTC, as appropriate, may have a basis to take action against such “unfair or deceptive practices.” However, the Department should not *require* sites that have information about more than one airline to carry every single carrier product (or bear a “bias” label) any more than the FTC should require every retail store or Internet shopping portal to carry every brand.

C. The Department Can Rely on Carriers to Police Display Bias.

While the Department may have been able to effectively regulate the conduct of the handful of CRSs that operate in the United States today, it would be highly

impractical for the Department to become involved with evaluating the search logic and display capabilities, and policing through enforcement actions, the practices of the numerous travel sites operating on the web. The Department does not have the resources to accomplish this enormous task.

Fortunately, the Department does not have to do so. As long the Department allows carriers the freedom to chose which Internet sites they participate in, carriers will monitor Internet vendors with whom they have distribution arrangements to ensure that the carrier's services are getting the appropriate display priority.

A credible threat of withdrawal from sites that fail to meet carrier expectations is essential to a healthy functioning marketplace. For this reason, it is particularly important that the Department empower carriers with viable "self-help" alternatives (and eliminate the regulatory protected franchise of Internet vendors like Travelocity that rely on a perverse application of the CRS forced participation rule to deny carrier choice).

Commercial resolution of issues involving Internet distribution is vastly preferably to regulatory mandates and adjudications, and is most consistent with the Department's statutory mandate to place "maximum reliance on competitive market forces."

A recent example illustrates this point very well. As reported by the Aviation Daily, Northwest withdrew from LowestFare.com, over a dispute involving alleged

display bias. See Attachment 1. After a four-month audit of Internet sites, Northwest concluded that LowestFare.com's displays did not give Northwest flights appropriate display priority. LowestFare.com disputed these allegations, and it also appears that there were additional difficulties relating to the technical capabilities of the system. When LowestFare did not meet Northwest's demands, Northwest withdrew from the site. Northwest noted that its participation had contributed to the "credibility" of LowestFare in claiming to consumers that it offered a comprehensive selection of low fares.

Now, just two weeks later, Aviation Daily reports that Northwest has again resumed selling tickets on LowestFare.com. See, Attachment 2. According to a Northwest executive, "LowestFare.com has quickly addressed the concerns expressed by Northwest regarding the sorting of flights and the display of low fares to customers . . ." Id.

A number of observations can be drawn from these events:

(1) Internet sites are not "essential facilities." Left to their own devices, carriers can and will de-list themselves from Internet sites that fail to meet anti-bias expectations. The same cannot be said of CRS systems which continue to hold market power over carriers, due to the CRSs' lock on travel agency information and the consequential unacceptably high cost to carriers for withdrawing from any system.

(2) The effort required to police display bias is substantial. As noted, Northwest spent some *four months* auditing the displays of all the various Internet sites. Carriers have thus shown that they will actively police sites and take appropriate commercial action when necessary to gain fair treatment.

(3) The commercial issues involved in potential disputes are not clear-cut. There was substantial disagreement between Northwest and the LowestFare.com as to whether the displays at issue were or were not biased. The Department should avoid creating a regulatory scheme that will encourage parties to litigate through enforcement proceedings every commercial dispute between airlines and Internet vendors concerning display logic and marketing preferences.

(4) The marketplace provides a remedy. If a site does not promote a carrier's product in line with expectation, the carrier can de-list its services. Moreover, Internet vendors are willing to respond quickly to remedy disputes. The Northwest/LowestFare.com dispute was resolved within just two weeks of Northwest's action to de-list. This is a more efficient process than settling every case through the Department's involvement in lengthy enforcement proceedings. The marketplace can only function as a regulator,

however, if the Department ensures that carriers have the ability to determine their individual participation in Internet sites.

(5) Finally, as noted, Internet sites benefit from the “credibility” of claiming participation from large numbers of carriers. Thus, Internet sites have appropriate incentives to resolve disputes and to offer carriers reasonable and unbiased participation terms.

D. If the Department Adopts New Disclosure Requirements for Online Travel Agencies, All Travel Agencies Should be Covered by the Same Rules.

Delta sees no reason to treat online travel agencies differently than traditional ones.¹ Much has been said by the proponents of Internet regulation about the need to protect consumers using multi-carrier websites who “might not know” that a particular site was not providing completely comprehensive and unbiased information. However, the Department has declined to adopt similar measures with respect to the business practices of traditional travel agencies. If the Department is going to consider new disclosure requirements, it should do so with respect to all retail distribution outlets that sell the services of multiple airlines – including travel agencies.

¹ Internet travel portals serve a function more closely akin to a retail travel agent than a CRS. Whereas CRSs provide a technical intermediate function, Internet portals, like retail agents, merely use CRSs to determine flight options and take reservations for customers.

The Department recognizes and approves of the competition that takes place in the sale of air transportation at the travel agency level. However, the various incentive programs offered by airlines to travel agencies create travel agent preferences toward certain carriers, of which many retail customers are unaware. It is difficult to understand why, from a policy perspective, a customer using the Internet should be required to be informed of any carrier preference the Internet retailer might have, but another consumer using a telephone to call his local travel agent would not.

Thus, a customer of a traditional travel agency might potentially find relevant, for instance, that his travel agent received a substantial override commission from one carrier, but not another. Or, that if a travel agent booked, say, 100 tickets to Los Angeles that month with a connection via Denver, she would receive a free ticket to Hawaii.

These types of sales and incentive programs are not unique to the airline industry, but are, in fact, practiced by automobile manufactures, electronics producers, clothing companies and countless other businesses. Neither the FTC nor the Department has found these programs to be harmful to consumers in the past. Delta does not believe that it is necessary to adopt sweeping new disclosure requirements because, in the end, the marketplace will steer business away from travel agents that do not provide accurate, low cost, and quality advice to their

customers. However, the Department should not adopt a double-standard with respect to disclosure requirements for on-line and traditional travel agents.

E. There is No Basis to Single Out Carrier-Owned Internet Sites for Special Regulatory Treatment.

Some commenters, *e.g.* Expedia, American Express, have advanced the self-interested proposition that “independent” multi-carrier sites require no new regulation, but that multi-carrier Internet sites which are sponsored by airlines must be subject to CRS-type regulation. There is no basis to this contention, which amounts to little more than attempting to export regulatory burdens to competitors.

The historical justification for regulating carrier-owned CRSs does not apply to carrier-owned Internet sites. This is because the ability of the CRSs to influence airline competition stems from the unique dependence and lack of choice faced by travel agents using CRS systems. As described by Expedia:

Having built this captive audience, each CRS’s airline-owner could and did then use the system to mislead consumers and prejudice competition, primarily by refusing to allow competing airlines to participate fully or on reasonable terms in its CRSs, or by biasing its CRS as to favor the airline-owner’s flights, regardless of value.

Expedia at 3.

Unlike travel agents that continue to be bound to a particular CRS system by adhesionary contract terms, it is highly implausible that any airline or airlines could create a “captive audience” of consumers on the web. The Internet provides

consumers with complete mobility to purchase travel from any of hundreds of online sites. Moreover, the Department will be able to monitor the development of Internet competition and can take appropriate remedial should there be *actual evidence* that competition is endangered. Speculative regulation of carrier-own Internet sites at this time – which could only be based on implausible conjecture and hypothesis -- is not appropriate or consistent with the Department's statutory mandates.

III. THE CURRENT CRS RULES NEED TO BE REFORMED.

Delta's prior comments have outlined a number of important areas where the CRS rules need to be reformed in order to close unintended loopholes in the current regulations, and to promote more effective competition in the CRS industry.

A. Emancipate Travel Agents from Restrictive CRS Contract Terms.

The Internet is changing the way consumers and airlines interact, just as the Internet is revolutionizing business practices in every other industry. Travel agents, however, are mired in long-term adhesionary contracts with traditional CRSs that prevent them from taking advantage of new web-based technologies. We are rapidly approaching a situation where consumers – with unrestricted access to the Internet – have more information about travel services than travel agents.

The Department needs to remove artificial barriers that prevent travel agents from taking full advantage of the Internet. This will enable travel agents to better serve their customers in ferreting out special offers and discount fares on the net. Improved access to the Internet will also increase competition for distribution services and may help to provide meaningful competition for booking fees, which have been spiraling out of control.

Delta has described the three primary means by which CRSs lock travel agents into relying only on a single information product: (1) productivity pricing, which creates a powerful disincentive to using other booking sources for fear of missing vital productivity quotas, (2) long-term contracts with excessive damages provisions, and (3) the exception enabling system owners to prohibit travel agents from using vendor-supplied hardware to access other data sources.

Productivity pricing is a prime target for corrective action in this rulemaking. Travel agents will be significantly deterred from booking services for clients via the Internet, if they face losing productivity pricing credits, which are vital to travel agents under the structure of current CRS contracts. An “unproductive” terminal (with a market value of a few hundred dollars) can cost an agency tens of thousands of dollars over the life of a contract if productivity pricing targets are not met. The Department has already recognized the harm caused by directly analogous minimum use contracts, and attempted to ban them the prior rulemaking. However, the CRSs

have simply resurrected this same harmful practice under the guise of “productivity pricing.” In order to maximize the competitive benefits of the Internet, travel agents must not have productivity pricing quotas hanging over their heads like the Sword of Damocles, each time they use the Internet, rather than a CRS, to service client needs.

One of the easiest and most straight-forward revisions the Department should make to the rules is to ban CRS contracts in excess of 1 year, and enable travel agents to cancel CRS contracts on three months notice without penalty. With prices for personal computers well under \$1,000, the previous rationale for long-term contracts to amortize expensive “system hardware” no longer exists. The Department’s three year/five year “option” rule has not worked to improve CRS competition. The Department should follow the lead of the European Commission (which has recognized there is no benefit in enabling CRSs to rope travel agents into long-term contracts) by adopting a one-year/no penalty rule, so as to enhance travel agent mobility and choice of information sources. As new competitive information sources become available online, it is more important than ever for travel agents to have the ability to extricate themselves from excessively long-term CRS contracts.

Finally, travel agents must have unrestricted access to the Internet from every desktop. Hardware costs have never been lower, and it is time for the Department to remove the unnecessary exception to the regulations which permits CRS vendors to restrict access to other data sources from their terminals. If system owners object

to travel agents using “system” equipment to access other data sources, then the Department should not permit CRS vendors to offer hardware as part of a contract for CRS services. All hardware should be required to be offered in a separate contract, which would lead to CRS equipment leases at market rates.

B. Eliminate Illegal Tying of Internet Products by CRS Vendors.

The Department must put an end to the illegal tying activities that permit CRS vendors to force carriers to participate in Internet products that are bundled together with traditional CRS services. Sabre itself has previously described that traditional CRS services and the Internet products are two separate and distinct commodities, targeted at two separate categories of users:

- A dedicated network linked to professional travel agents. Although this is the “traditional” channel, a travel agent from twenty years ago would hardly recognize today’s multi-functional systems which are far more capable than the limited-function terminals found on travel agents’ desks in those early days.
- Internet services provided to individual travelers, who are able to access SABRE and make reservations from their home computers using SABRE’s Travelocity and easy SABRE products. (SABRE Initial Comments at 4.)

Now, Sabre is touting an entirely different theory:

- . . . as a legal matter, the Sabre system is one system. Distributing though Sabre requires distribution through all the channels of the Sabre system, and it has been that way from the inception of the industry. Consequently, there is no “tying” at

issue. Sabre distribution is one product. (Sabre Reply Comments at 26).

Sabre's comments here are strikingly reminiscent of Microsoft's contention only a year ago that its operating system and browser software were "one product." In view of the entirely different applications for which Travelocity and Sabre are used – one for travel agents, and one for consumers -- they can hardly be considered "one product." Indeed, although owned by Sabre, Travelocity is even incorporated as a separate entity. Sabre should not be allowed to leverage its dominant position in the CRS industry to lock carriers in to separate ventures propagated by Sabre or its affiliates on the Internet.

C. Eliminate The Forced Participation Rule.

The forced participation requirement contained in Section 255.7(a) is detrimental to competition in the CRS and airline industries and should be eliminated. Forced participation effectively eliminates the ability of carriers to bargain with other CRS providers over system enhancements, leading to economically inefficient results. See Delta Comments at 21-25.

It is also essential that all carriers have the ability to tailor their CRS participation levels to be consistent with the needs of discrete carrier product offerings. The existing forced participation rule prevents system owners, such as Delta, from doing this.

If, however, the Department retains the forced participation rule, carrier system marketers must also be subject to it. The changes in market circumstances resulting from airlines selling their CRS ownership interests but retaining marketing ties with CRSs make it critical for the Department to resolve this disparity immediately. We are now in the untenable situation where Sabre, the country's largest CRS, and American and Southwest, two of the largest U.S. carriers, are allied through a marketing relationship, but are immune from the forced participation rule. This gives American and Southwest important bargaining leverage in dealings with other CRSs that competing airlines lack.

IV. THE DEPARTMENT SHOULD RETAIN THE CRS RULES, BUT ONLY IF THEY ARE APPLIED TO SYSTEMS MARKETING BY CARRIERS.

Airlines, travel agents, CRSs and consumer advocates were almost universally in favor of continuing the basic CRS regulatory framework in effect, and believe that the Department has sufficient jurisdiction to regulate carrier-marketed CRSs as well as carrier-owned CRSs. See, e.g. Supplemental Comments of Delta, American, ASTA and Sabre. There was general consensus that there is no regulatory distinction to be drawn between CRSs that are owned, controlled or marketed by carriers.² *Id.*

² Strong marketing relationships are at least as significant as the 5 percent ownership threshold (which is far from sufficient to exercise control) previously established by the Department as the basis for exercising jurisdiction.

So long as carriers have an interested financial relationship with a CRS – whether through direct ownership, or through commercial alliances – there will continue to be incentives for each partner to help the other succeed – with potentially adverse consequences for competition in the sale of air transportation.

Delta's supplemental comments explained the inexorably close ties between the CRS and airline industries. See, e.g. Delta Supplemental Comments at n.1.

Powerful cross marketing incentives can exist between carriers and CRS, especially given that CRSs are compensated in direct proportion to bookings by their participating carriers, and that carrier-marketers have financial incentives to increase the use of their allied CRS partners' systems.

In light of the unique dependence of travel agents on CRS systems, and the significant potential for harm in the sale of air transportation (which was, in fact, shown to exist prior to the Department's adoption of the rules), the Department continues to have ample jurisdiction under its section 41712 authority to regulate carrier-marketed systems. The Department has special expertise in this area, and continued regulation by the Department is preferable to other alternatives. However,

**Supplemental Reply Comments
of Delta Air Lines, Inc.
Page 26**

should the Department find that it lacked jurisdiction, this regulatory gap would be filled by the FTC.³

Even Sabre concedes that “the disaffiliation of CRSs from airlines is a process that is not complete and far from universal” and that “as Sabre retains marketing agreements with American and Southwest, we do not take issue with the Department’s instructions to us that we remain subject to the regulations.” Supplemental Comments of Sabre at 7, 9.

The Department should formalize those “instructions” by adopting formal changes to the rules, as Delta proposed, to specifically include carrier system marketing agreements as part of its definition of covered systems. These changes will help to bring the rules up to date, and ensure that carrier system marketers and

³ The Department's ability to regulate CRS entities is a result of the Department's power to regulate the conduct of "air carriers" and "ticket agents," under the Federal Aviation Act. As recognized by ASTA's comments:

If there is no link, through ownership, control, operation or marketing between an airline and a "system" (defined in the regulations essentially as a computer program with certain information in it), the regulations cannot control what that "system" does. ASTA Comments at p.4

To the extent that the Department does not have jurisdiction, the Federal Trade Commission would have jurisdiction over CRS operations that are not owned, operated or controlled by airlines under Section 5 of the Federal Trade Commission Act.

their allied CRS counterparts are appropriately covered as the Department intended in section 255.2.

A. The Department Should Continue to Regulate Systems and Not Ticket Agents.

Some commenters have proposed, as an alternative means of jurisdiction, that the Department could mandate ticket agents' use of only compliant systems, thereby indirectly forcing CRSs to comply with the Department's rules. See, e.g. American at 30; America West at 5. For the reasons stated above, this approach is unnecessary because the Department has sufficient authority to regulate all CRS systems owned or marketed by carriers.

Moreover, such a rule would have the adverse and unintended consequence of severely limiting travel agents' choice of information sources. Travel agents today are free to use whatever means they find most expeditious to service their client's needs. The Department should preserve this flexibility and avoid any rule that could negatively impact the beneficial role of the Internet in helping travel agents improve client service and reduce distribution costs. Thus, travel agents could not help consumers by looking for bargain fares at alternative sites on the Internet, unless those sites complied with the CRS rules. Nor could travel agents book directly from carrier inventory via the Internet, because direct-access portals to carrier databases would not be CRSs. Customers rely on travel agents to use their professional skills

to locate the best fare possible though whatever means are available. The Department should not adopt a new regulatory regime that would limit travel agent options.

V. CRS BOOKING DATA

Delta's supplemental comments detailed some of the many valuable and procompetitive uses of MIDT data. This is the most timely and accurate traffic data available to carriers, and is frequently the *only* data available to support international route planning activities. Carriers also use this data to track airline sales performance, and to determine where sales and incentive programs are needed or should be adjusted to improve results. The essence of the rule, as with the release of other traffic data maintained by the Department, is that all carriers have access to CRS data on equal and nondiscriminatory terms.

Some smaller carriers have objected to the cost of the data. While Delta would certainly not object to the Department mandating a lower cost for MIDT data, to date, the Department has declined to regulate the prices charged by CRSs for any of their services.

VI. CONCLUSION

The experience with airline distribution on the Internet has thus far show the web to be an open and procompetitive arena, producing substantial benefits for

consumers. There is vigorous competition, and, in contrast to the CRS industry, the Internet has demonstrated the potential to be self-governing. In these circumstances, and absent any actual showing of specific and identifiable competitive harm, the Department should refrain from regulating airline distribution on the Internet.

There is a benefit to continuing the CRS rules, but only if they are amended to cover marketing, as well as ownership, affiliations with carriers. The Department had ample and well-documented evidence of CRS abuses, prior to issuing the rules in 1984, and that same potential exists today, notwithstanding the evolution of carrier affiliations with CRSs from direct ownership interests to marketing alliances.

Respectfully submitted,

Robert E. Cohn
Alexander Van der Bellen
SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8060

Attorneys for
DELTA AIR LINES, INC.

Aviation Daily, Wed., October 11, 2000

Northwest Withdraws From LowestFare.com In Display Bias Dispute

Northwest has told LowestFare.com it can no longer sell Northwest tickets through Sabre because of a dispute over preferred display of selected carriers. In a memo to LowestFare.com Monday, Northwest said it would no longer allow the site to display Northwest fares until display bias problems were resolved. Northwest first notified LowestFare.com of the bias display issues in August and gave it until Sept. 6 to fix the problem but later extended the deadline.

Northwest VP-Distribution Planning Al Lenza told *The DAILY* that Northwest has been conducting audits of all Internet sites over the last four months. Northwest already complained of display bias to Travelocity.com (*DAILY*, July 31), but Lenza said most problems there appear to be caused by system deficiencies rather than bias. He said Northwest continues to have an issue with Travelocity.com over displaying preferred carriers that have agreements with the company. When a customer asks for additional flights, Lenza said, those carriers continue to appear. "We're still working with them, but we're making progress," Lenza said. "The LowestFare.com issue is the worst because it's clear they have special agreements" with carriers like America West and TWA, "even when we have the lowest fare." Lenza said Northwest asked LowestFare.com to fix the problem or disclose to the consumer that they were not getting the lowest price, "but they claimed they couldn't do that." Lenza said Northwest's inventory is being used to provide LowestFare.com credibility by allowing it to claim they sell tickets on all carriers, "but behind the scenes we get sacrificed in display logic and don't have a chance to compete." Northwest, meanwhile, is paying CRS fees, booking fees and a commission. "After almost three months of going back and forth, we decided we're better off not being sold on their site," Lenza said.

LowestFare.com CEO Ken Swanton denied the site biases displays in anyway "other than offering the lowest available fare." He said the results Northwest "takes exception to are instances where they do not appear at the top of the displays." Swanton told The DAILY that LowestFare.com sorts information by price, time, if the consumer wants it, and availability. "Any discrepancy in the order that Northwest appears is as a result of how the available flights and the appropriate fares are presented to us by Sabre. Furthermore, we also give the consumer the option of asking for nonstop or connecting flights. . . . There is emphatically no bias in our displays," he said.

The Aviation Daily, October 23, 2000

Northwest Resumes Display on LowestFare.com

Northwest last week reached an agreement with LowestFare.com on display of its inventory. "LowestFare.com has quickly addressed the concerns expressed by Northwest regarding the sorting of flights and display of low fares to customers utilizing their site," said Northwest VP-Distribution and E-Commerce Al Lenza. Northwest told LowestFare.com earlier this month that it could no longer display Northwest fares because of alleged bias (DAILY, Oct. 11). The problem appeared to stem from Sabre system deficiencies, Lenza said, and although Northwest had problems with other carriers, Lowest Fare.com was the worst because it clearly had special agreements with carriers such as America West and TWA. LowestFare.com CEO Ken Swanton told The DAILY that displays were not biased against Northwest.

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 2000, served the foregoing Supplemental Reply Comments of Delta Air Lines, Inc., upon those persons listed below by depositing copies thereof in the United States mail, postage prepaid and addressed as follows:

Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 17th St., NW, Ste. 600
Washington, DC 20036

R. Bruce Wark
Senior Attorney
American Airlines, Inc.
4333 Amon Carter Blvd.
MD5675
DFW Airport, TX 75261

Frank J. Costello
Jol A. Silversmith
Paul E. Schoellhamer
Charles J. Simpson
Zuckert Scoutt & Rasenberger
888 Seventeenth St., NW
Washington, DC 20006-3309

Bruce Cunningham
Two Moonvine
The Woodlands, TX 77380

Sarah Wynn, Corporate Counsel
American Express Travel
Related Services Co., Inc.
World Financial Center
New York, NY 10285

Don H. Hainbach
Boros & Garafalo, PC
1201 Connecticut Ave., NW
Washington, DC 20036

George U. Carneal
Lisa A. Harig
Hogan & Hartson LLP
Columbia Square
555 13th St., NW
Washington, DC 20004

Thomas J. Whalen
Condon & Forsyth
1016 16th St., NW, Ste. 700
Washington, DC 20036

Edward P. Faberman
Air Carrier Association of America
1500 K Street, NW, Ste. 250
Washington, DC 20005

Jack Foley
Executive Vice President
Sales and Marketing
Aer Lingus Limited
538 Broad Hollow Road
Melville, NY 11747

Arthur J. Molins, General Counsel-NA
Lufthansa German Airlines
1640 Hempstead Turnpike
East Meadow, NY 11554

Ray A. Mundy, Executive Director
Airport Ground Transportation
Association, Inc.
5320 Riverbriar Road
Knoxville, TN 37919

Thomas L. Ray
U.S. Department of Transportation
400 Seventh St., SW, Room 4102
Washington, DC 20590

Ambassador
European Union Delegation of the
European Commission
2300 M St., NW
Washington, DC 20037

David M. O'Connor
International Air Transport Association
1776 K Street, NW, Ste. 400
Washington, DC 20006

Theodore Knappen, Government Affairs
Greyhound Lines, Inc.
1001 G St., NW
Washington, DC 20001

Stephen Gardner
Lyn-Lee Travel
3102 Maple Ave., Ste. 330
Dallas, TX 75201

Jack Mannix, Managing Director -
Travel Related Services
American Automobile Association
1440 New York Ave., NW, Ste. 200
Washington DC 20005

David Lambert, President
Preview Travel Online, Inc.
747 Front Street
San Francisco, CA 94111

John Kloster, Executive Director
Midwest Agents Selling Travel
15 Spinning Wheel Road, Ste. 336
Hinsdale, IL 60521

Robert N. Duggan
Pan American World Airways, Inc.
9300 NW 36th Street
Miami, FL 33178

Constance O'Keefe
Law Offices
1201 Connecticut Ave., NW, Ste. 850
Washington, DC 20006

James R. Weiss
Preston Gates Ellis & Rouvelas Meeds
1735 New York Ave., NW
Washington, DC 20006

Paul Stephen Dempsey
1900 Olive Street
Denver, CO 80220

David A. Schwarte, General Counsel
The SABRE Group
4255 Amon Carter Blvd.
Ft. Worth, TX 76155

Joanne W. Young
Baker & Hostetler LLP
1050 Connecticut Ave., NW, Ste. 1100
Washington, DC 20036

Mark Pestronk
4041 University Drive, Ste. 450
Fairfax, VA 22030

Paul V. Mifsud, Vice President
KLM Royal Dutch Airlines
2501 M Street, NW, Ste. 612
Washington, DC 20037

Donald T. Bliss
O'Melveny & Myers LLP
555 13th St., NW, Ste. 500 West
Washington, DC 20004

Jon Ash
Global Aviation Associates, Ltd.
1800 K St., NW, Ste. 1104
Washington, DC 20060

William E. O'Brian, Jr.
Ross Dixon & Masback LLP
601 Pennsylvania Ave., NW
North Building
Washington, DC 20004

Donald L. Pevsner
1765 East Riviera Drive
Merritt Island, FL 32952

David H. Coburn
Steptoe & Johnson LP
1330 Connecticut Ave., NW
Washington, DC 20036

Gary R. Doernhoefer, General Counsel
ORBITZ
200 S. Wacker Drive, 19th Floor
Chicago, IL 60606

Glenn P. Wicks
The Wicks Group PLLC
900 19th St., NW, Ste. 350
Washington, DC 20006

Lawrence Nagin, Executive Vice
President – General Counsel
US Airways, Inc.
Crystal Park Four
2345 Crystal Drive
Arlington, VA 22227

David A. Addis
Covington & Burling
1201 Pennsylvania Ave., NW, 9th Floor
Washington, DC 20044

Paul Ruden, Sr. Vice President
American Society of Travel Agents
1101 King Street
Alexandria, VA 22314

John K. Hawks, President
Association of Retail Travel Agents
2692 Richmond Rd., Ste. 202
Lexington, KY 40509

Megan Rae Poldy
Associate General Counsel
Northwest Airlines, Inc.
901 15th St., NW, Ste. 310
Washington, DC 20005

R. Bruce Keiner
Crowell & Moring LLP
1001 Pennsylvania Ave., NW, Ste. 1100
Washington, DC 20004

Marshall S. Sinick
Squire Sanders & Dempsey LLP
1201 Pennsylvania Ave., NW., Ste. 500
Washington, DC 20004

Caren Cook Burbach, Vice President
And General Counsel
System One Amadeus LLC
2929 Allen Pkwy., 16th Floor
Houston, TX 77019

Douglas L. Abramson, Vice President,
General Counsel and Secretary
Worldspan LP
300 Galleria Parkway
Atlanta, GA 30339

Robert P. Silverberg
Silverberg Goldman & Bikoff LLP
Michael F. Goldman
1101 30th St., NW
Washington, DC 20007

Arthur T. Voss, Vice President and
General Counsel
Frontier Airlines, Inc.
12015 East 46th Ave.
Denver, CO 80239

Jeffrey A. Manley
Wilmer Cutler & Pickering
2445 M Street, NW
Washington, DC 20037

Darryl Jenkins, Director
The Aviation Foundation
The George Washington University
PO Box 250
Marshall, VA 20116-0250

Robert W. Kneisley
Southwest Airlines, Inc.
1250 Eye St., NW, Ste. 1110
Washington, DC 20005

Roger W. Fones
John R. Reed
Antitrust Division
US Department of Justice
325 7th St., NW, St. 500
Washington, DC 20530

